No. 20418

United States
COURT OF APPEALS
for the Ninth Circuit

CONTINENTAL CASUALTY COMPANY,
a corporation,

Appellant,

v.

JUSTIN N. REINHARDT, SEYMOUR L. COBLENS,
NORMAN A. STOLL and MORTON A. WINKEL,

Appellees.

Appeal from the United States District Court for the District of Oregon

APPELLANT'S REPLY BRIEF

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defend is to be measured by the allegations of the complaint filed against the insured. The Fordham complaint alleged an excluded claim and appellant, therefore, had no duty to defend. The Fordham complaint alleged malicious conduct which was excluded under exclusion (a); further, it alleged conduct of Winkel which was not an "act arising out of the performance of professional services for others in the assured's capacity as a lawyer." Therefore, appellant had no duty to defend.

The bulk of appellees' brief (Br. 7-11) is concerned with the proposition that "trade libel need not necessarily involve actual malice." Appellees therefore argue that appellant's duty to defend is not obviated by exclusion (a).

Appellants' policy expressly excludes coverage for "malicious acts" of the insureds. Appellees tend to turn the operative word from "malicious acts" into "malice" as the latter term is used in defamation actions. Superficially such an attempt seems plausible since the cause of action asserted against Winkel by Fordham was defamation. However, the fallacy is revealed when the basic issue is examined, i.e., whether Winkel and the partnership was entitled to a defense under a policy which excluded "malicious" conduct.

Appellant did not issue a "defamation" policy to appellees. Essentially, the insurance contract was a lawyers' errors and omissions policy designed to afford protection from the consequences of negligence and carelessness. Exclusion (a) was incorporated into the policy to specifically exclude wilful, fraudulent, criminal and

intentional misconduct on the part of the insured. The courts do not rewrite insurance policies merely because one party wishes expanded coverage *after* the fact. A reading of this policy indicates the intended coverage excluded the type of conduct allegedly committed by Winkel per the Fordham complaint.

Appellees urge that "malice" is ambiguous in defamation cases and, being susceptible to two meanings, the term should be construed most strongly against the insurer. The interim step in appellees' reasoning process is that one can libel another without "malice" as that term is commonly understood. Unfortunately appellees ignore the face of the complaint which governs appellant's duty to defend; the complaint alleges facts which are plainly excluded from coverage. Paragraph XIV (App. Br. 5) of Fordham's complaint eliminates any possible doubt evoked by appellees' brief. Paragraph XIV obviously charges Winkel with maliciously conducting himself in this endeavor; the allegations are not conclusory, but rather are of ultimate facts supporting the conclusion of maliciousness. Therefore, on the face of the complaint, no duty to defend exists.

Appellant fails to grasp the substance of appellees' contention that, at best, the Fordham complaint is premised in part upon grounds which are not excluded from coverage. Apparently it is contended that Fordham could recover general damages if "implied malice" is shown, but punitive damages only if "actual malice" is proven. First, it is clear that the *policy* makes no such distinction between "implied" and "actual" malice; the